Best Distributing Co., Inc. ***and*** **Edward M. LaFave.**
Case 3-CA-9494

March 20, 1981

DECISION AND ORDER

On November 10, 1980, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, and counsel for the General Counsel filed a reply brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Best Distributing Co., Inc., Watertown, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Beer Drivers, Brewery, Soft Drink, and Maintenance Workers, Local Union No. 263, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by terminating or otherwise discriminating against our employees because of their union membership or activities.

WE WILL NOT discourage membership in the above-named Union by failing and refusing to apply the terms and conditions of employment set forth in the collective-bargaining agreement between us and the above-named Union to all our employees encompassed by the unit of the collective-bargaining agreement.

WE WILL NOT threaten employees with reprisals, including layoff, because they joined or attempted to join the above-named Union.

WE WILL NOT tell our employees that they are required to notify us before they join a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Edward M. LaFave his former job, or, if such job no longer exists, to a substantially equivalent postition, and will restore his seniority and other rights and privileges.

WE WILL pay Edward M. LaFave any backpay which he may have lost as a result of our discrimination against him, as well as any benefits which might be due him as a consequence of our failure to apply to him the terms and conditions of our collective-bargaining agreement with the above-named Union, since on or about October 11, 1979, with interest.

BEST DISTRIBUTING CO., INC.

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: This case came on for hearing before me in Watertown, New York, on April 16, 1980, pursuant to an amended complaint issued by the Acting Regional Director for Region 3 of the National Labor Relations Board, on March 27, 1980, which is based upon a charge and an amended charge filed by Edward M. LaFave on December 19, 1979, and February 13, 1980, respectively. The amended complaint alleges, in essence, that Best Distributing Co., Inc. (herein the Company or Respondent) engaged in certain acts and conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein the Act), as hereinafter detailed. The duly filed answer of the Respondent to the amended complaint admits the jurisdictional allegations but generally denied the commission of any unfair labor practices.

The parties were afforded full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Posthearing briefs have been received from counsel for the Respondent and counsel for the General Counsel, which have been duly considered.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT[1]

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Respondent is engaged in the sale and distribution of beer and related products in Watertown, New York, and surrounding areas. It is a relatively small operation—at the time of the events here at issue, it employed three truckdrivers, three helpers, and one warehouseman.[2] The overall supervision of the operation is lodged in Charles Lamon, the general manager. In the office with Lamon are two office employees who perform bookkeeping and secretarial services.

For many years prior to the events herein, the Respondent has been in a collective-bargaining relationship with the Union covering the drivers, helpers, and warehousemen. The last collective-bargaining agreement was entered into on April 27, 1978, to run to April 26, 1981.

B. *The Termination of the Charging Party*

Edward M. LaFave was initially employed by the Respondent in May 1979,[3] as a truckdriver's helper. It was understood that LaFave's employment would last only during the summer months because he was a student, and planned to enroll in college in the fall. Accordingly, LaFave left the Respondent on or about August 24, to resume his education. However, in October, LaFave dropped out of college and sought to return to employment with the Respondent. He was reemployed by Lamon on or about October 11, again as a helper. At that time, as previously indicated, Respondent employed two other helpers—Kingsbury and Brady.[4]

On the evening of Friday, November 9, LaFave attended a union meeting which was held at the Eagles Club in Watertown. While there, he filled out documents to join the Union, which was observed by the warehouseman, Doolittle (who was a member of the Union). LaFave overheard Doolittle remark to another union member, truckdriver Frank Peccori: "You just signed a death warrant. You should have told Charle [Lamon] before you joined the Union. The chances are you won't have a job come Monday."[5]

Later that evening, Doolittle telephoned Lamon at the latter's home and told him that LaFave had joined the Union. According to Doolittle's testimony, Lamon hung up on him.

The following Monday morning, LaFave reported for work and observed Lamon and Doolittle talking on the loading dock. When Lamon saw LaFave, he turned to him and said, "Go home today. We don't need you. You are laid off as of Friday at 5:30." About that time, Lamon also told Colin Brady, another truckdriver's helper, to go home. Lamon then directed LaFave to go into the warehouse office and "talk about it." Accordingly, LaFave, Lamon, and Thomas Peccori, the union steward (who accompanied LaFave at the latter's request) went into the office. There, Lamon told LaFave that the latter was being laid off for lack of work due to poor business conditions, and that Lamon could not afford to pay LaFave the contract wage if he was a union member. LaFave responded that it sounded to him (LaFave) that he was being laid off for joining the Union. Lamon responded, "Take it anyway you like it." Lamon also advised that, "if necessary, he would lay off the whole crew every 28 days and start with a new one."[6] During the conversation, Lamon also told LaFave that it was the policy of the Company that employees inform management before they joined the Union.[7]

The following Wednesday, LaFave went to the Company for the purpose of filing a grievance. When he gave it to Lamon, the latter advised that if LaFave secured a class 3 driver's license (which was apparently required for anyone who drove one of the Respondent's trucks), LaFave could take over Peccori's position as a truckdriver when the latter left for Florida. LaFave responded that he had enrolled in the Union as a helper, and did

[1] There is no issue as to the jurisdiction of the National Labor Relations Board, nor of the status of the Union (Beer Drivers, Brewery, Soft Drink, and Maintenance Workers, Local Union No. 263, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) as a labor organization within the meaning of the Act. The complaint alleges sufficient facts concerning the business operations of the Respondent, which are admitted by answer, upon which I may, and do hereby, find that at all times material the Respondent has been an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

The complaint alleges, the answer admits, and I find that at all times material the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

[2] The warehouseman, Lloyd (Pickles) Doolittle, is alleged in the complaint to be a supervisor. This is disputed by the Respondent as discussed, *infra.*

[3] All dates hereinafter refer to the calendar year 1979, unless otherwise indicated.

[4] As the classification of helper implies, the duties of a truckdriver's helper at the Respondent's establishment included the loading and unloading of the beer trucks, and otherwise assisting the driver in the performance of his duties, such as stacking the cases of beer at a customer's establishment.

[5] Credited testimony of LaFave, who impressed me as an honest and forthright witness. Doolittle did not deny the statements attributed to him. He admitted having "quite a few drinks" that evening, and recalled some discussion about a union membership; however, he could not remember exactly what was said. He also admitted that he knew that Lamon was sensitive about employees joining the Union and not letting him (Lamon) know about it.

[6] Credited testimony of LaFave. Lamon did not specifically deny the statements attributed to him, although he did refute the allegation that LaFave was terminated because he joined the Union. Peccori was not called as a witness at the hearing; the record shows that he left the employment of the Respondent in December to go to Florida, and has not apparently returned.

Regarding the threat to lay off the whole crew every 28 days, it should be noted that the collective-bargaining agreement between the Respondent and the Union has a union-security clause which, as is normally the case, gives new employees 30 days after their employment to join the Union as a condition of employment.

[7] Lamon admitted that he became disturbed any time an employee joined the Union without first telling the Company. His explanation for this position was that "a lot of paperwork" takes place when this occurs, such as notifying the insurance company, pension institutions, and the payroll clerk so that union dues are properly deducted: "It's just a common policy and courtesy that we always be notified before anybody went into the union, and it's been that way in Watertown for 20 years."

not believe it was necessary to get a class 3 license to protect his job.[8]

II. ANALYSIS AND CONCLUDING FINDINGS

A. *Supervisory Status of Doolittle*

The complaint alleges that Lloyd (Pickles) Doolittle is a Section 2(11) supervisor; the Respondent denies this allegation.

As previously noted, the Company classifies Doolittle as a warehouseman. The evidence shows that he has been employed by the Respondent for 21 years, which is longer than any of the other employees. His principal function is performing warehouseman functions, and he has an office there. However, he also drives a truck on occasions. Unlike the other employees who work on an hourly basis, Doolittle is paid a salary and does not punch the timeclock. He also receives a Christmas bonus which is larger than the other employees receive. He is the only person at the Respondent's facility (other than Lamon) who has a key to the premises.

The evidence shows that the only acknowledged supervisor of Respondent is the general manager, Lamon. He admitted spending approximately 50 percent of his time away from the facility primarily soliciting business. During his absence, Doolittle is in charge of the facility and gives directions to the other employees with respect to their duties. Doolittle testified that such directions to employees are based upon notes received from Lamon; however, no such notes were proffered into evidence in the case. Moreover, some of the evidence indicates that the type of directions given by Doolittle are not subject to such prior instruction. Thus, for example, LaFave testified without contradiction that when he was first hired in the summer, Lamon told him to do whatever Doolittle said. Another example, also testified to by LaFave without contradiction, is that on one occasion driver Gary Premo came into work apparently still under the influence of liquor, and Doolittle told him to get to work.

Under all circumstances, and particularly considering that if Doolittle were not considered to be a supervisor, the facility would remain unsupervised approximately one-half of the time, I am of the view, and therefore find, that at all times material, Doolittle possessed and exercised sufficient independent judgment in connection with his direction of other employees to constitute him a supervisor within the meaning of the Act.

B. *Alleged Interference, Restraint, and Coercion*

The complaint alleges that on or about November 9, at the Eagle Club in Watertown, Doolittle threatened an employee with an unspecified reprisal, because he joined the Union. The evidence shows, as herein above set forth, that when LaFave was filling out his initiation papers at the union hall on that occasion, Doolittle advised that LaFave had just signed his death warrant—that the chances were that he would not have a job the following Monday. While acknowledging that there was some discussion about union membership on this occasion, Doolittle did not recall exactly what was said. I find the statement attributed to him by LaFave to be substantially as the latter testified, and that such statement constituted interference, restraint, and coercion of employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

The complaint alleges that on or about November 12, Charles Lamon threatened to lay off employees if they attempted to join the Union. The evidence shows, as previously noted, that following LaFave's dismissal by Lamon on November 12, LaFave stated that it sounded to him as if he were being laid off for joining the Union. Lamon responded that LaFave could take it any way he liked it and, if it were necessary, Lamon would lay off the whole crew every 28 days and start with a new one. I find this statement to constitute a threat of reprisal for employees' attempts to join the Union, and therefore constitute interference, restraint, and coercion of their Section 7 rights in violation of Section 8(a)(1) of the Act.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by Lamon's telling employees, on or about November 12, that they were required to notify the Respondent before they joined the Union. As previously set forth, LaFave testified that Lamon told him on November 12, that it was the company policy that employees inform management before they joined the Union. In his testimony, Lamon affirmed this position, basing it upon the paperwork that was required to be performed upon such an occasion. I am unable to accept this reason as providing a legitimate basis for Respondent's defense. That is to say, ordinarily, the issue of an employee's joining or not joining a labor organization is a matter between him and the Union, without interference or concern of the employer. When an employee determines to join a union, it is the clear responsibility of the latter to notify the employer to make dues deductions (assuming they are required under the collective-bargaining agreement) or other payments such as to the Union's health and welfare fund, before the employer becomes responsible for such payments. Accordingly, I find that the Respondent had no legitimate right to require employees to so notify the Respondent of the employees joining the Union and, therefore, by advising the employees of such position it was interfering with, restraining, and coercing them in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.

C. *The Alleged Discrimination Respecting Edward M. LaFave*

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by laying off its employee, Edward M. LaFave on November 12, and by failing and refusing to apply the terms of its collective-bargaining agreement to LaFave with respect to wages, benefits, and terms and conditions of employment because he was not a member of the Union from October 11 to November 12. Respondent defends the layoff on the grounds that, as Lamon testified: "I terminated Mr. LaFave for unsatisfactory work." When asked to explain

[8] Several weeks later, LaFave telephoned Lamon and informed him that LaFave had secured his class 3 permit and needed practice driving a truck so that he could take his road test. Lamon responded that he would check with his insurance company and get back to LaFave, but never did.

how LaFave's work was unsatisfactory, Lamon listed three incidents involving LaFave which had occurred since he had been rehired in October as follows: (1) a delivery to Dad's Tavern in Alsburg, New York; (2) a delivery to Fay's drug store in Watertown, New York; and (3) a delivery to Turin, New York. Lamon explained that with respect to the Dad's Tavern incident, the delivery took 4-1/2 hours where it should have taken only 35 to 40 minutes. However, it should be recalled that LaFave was only a helper on the delivery truck and therefore the driver was the person primarily responsible for the time consumed in delivery. Moreover, the incident occurred 2 or 3 weeks before November 12 and Lamon only told LaFave that he would not afford "that type of situation." The incident at Fay's store, which occurred a week or two prior to November 12, involved improper stacking of the beer bottles which resulted in some breakage. Here again, the person primarily responsible was the truckdriver—in this case, Peccori. However, Peccori was not disciplined as a result of the incident, Lamon lamely explaining that he did not discipline Peccori because he knew Peccori was leaving his employment for Florida.

The Turin incident involved a delivery to a tavern in that area in which Premo was the driver and LaFave accompanied him as a helper. It appears that Premo became intoxicated to the extent that he could not make the delivery nor drive the truck back home, and that LaFave had to telephone his fiancee to come and get him. Here, again, the primary responsibility was that of the driver and the only disciplinary action which Lamon took against Premo was to "make sure nobody loaned him any more money in our office."

It would appear, based upon the foregoing discussion, that the issuance of the most extreme form of disciplinary action within the power of the Respondent to a helper on a delivery truck, without prior warning of such action, reflected a reason other than those incidents as the "real reason" for the termination. Moreover, as the record shows, a few days later, Lamon offered LaFave employment as a truckdriver if he would secure the necessary class 3 license. One might ponder the reason for this offer if LaFave was as unsatisfactory an employee as Lamon portrayed him. Lamon attempted to explain his conduct by stating that he knew that two of his drivers were leaving his employment in December, and therefore he would need a driver. However, that does not, of course, explain the willingness to hire an asserted unsatisfactory employee. The answer lies, in my judgment, in the manner in which the collective-bargaining agreement was administered between the Respondent and the Union.

That is to say, the record shows that although truckdrivers' helpers were encompassed in the unit covered by the collective-bargaining agreement, the Union sought to enforce the agreement only as to the truckdrivers, enabling the Respondent (as well as, apparently, other beer distributing companies in the area) to pay the helpers a mere minimum wage.[9] Under these circumstances, it is more readily understandable why Lamon became upset when he learned that one of the truckdriver's helpers joined the Union. This would not only require making the benefits of the collective-bargaining agreement applicable to LaFave, but would eventually, of course, make such benefits applicable to all the helpers since they would clearly learn of the benefits which they had not received but were entitled to. This explains, in my view, Lamon's abrupt decision to terminate LaFave the first thing Monday morning without previous warning, based upon conflicting reasons which, as indicated, do not withstand scrutiny.[10]

In view of all of the foregoing, including the statements made to LaFave by Lamon at the exit interview, I conclude, and therefore find, that the Respondent's asserted reasons for terminating LaFave on November 12, were pretextual, and that the real reason was because he joined the Union. His termination, therefore, was discrimination to discourage union membership in violation of Section 8(a)(3) of the Act.

Violation of Section 8(a)(3) is also found with respect to the failure to apply the terms of the collective-bargaining agreement to the Charging Party with respect to wages, benefits, and terms and conditions of employment. The evidence shows, as previously stated, that the Respondent did not apply the terms of the collective agreement to helpers since they were not union members, and the Union did not seek to enforce the agreement as to them. Nevertheless, the helpers were entitled to the benefits of the agreement and did not receive them solely because they were not members of the Union. Accordingly, Respondent's conduct in this regard was discrimination to discourage membership in a labor organization, in violation of Section 8(a)(3) of the Act.[11]

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent, set forth in section II, above, occurring in connection with the interstate operations of the Respondent, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow thereof.

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[9] Moreover, even as to the truckdrivers, the Union did not rigidly enforce the union-security clause of the contract. Accordingly, it appears that the Company paid the contract rate only to those truckdrivers who were members of the Union.

[10] In an affidavit given to the Board's field examiner during the investigatory stage of this proceeding, Lamon attempted to base his reason for LaFave's termination on economic reasons; i.e., a decline in business. However, that reason, too, does not withstand scrutiny. In the first place, an employer under such circumstances normally gives an employee some notice of declining business conditions. Secondly, LaFave had seniority over the other two helpers whom Lamon apparently also laid off but quickly recalled the same week. In any event, at the hearing, Lamon relied primarily upon LaFave's alleged unsatisfactory performance as the reason for termination.

[11] The record shows that subsequent to the events in this case, but prior to the hearing, the Union commenced to enforce the union-security provision of the contract more stringently.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating against Edward M. LaFave in the manner aforesaid, because he engaged in activities on behalf of the Union, as described above, and by thereafter failing and refusing to reinstate him, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By threatening employees with reprisals if they joined the Union, and by telling employees that they were required to notify the Respondent before they joined the Union, the Respondent has interfered with, restrained, and coerced employees within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent unlawfully terminated the employment of the Charging Party in the manner aforesaid, it is recommended that the Respondent offer the Charging Party immediate and full reinstatement to his former position, or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him. Any backpay found to be due shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[13]

The Respondent, Best Distributing Co., Inc., Watertown, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Beer Drivers, Brewery, Soft Drink, and Maintenance Workers, Local Union No. 263, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by terminating or otherwise discriminating against employees because of their union membership or activities.

(b) Discouraging membership in the above-named labor organization by failing or refusing to apply the terms and conditions of its collective-bargaining agreement with said labor organization to employees encompassed by the appropriate unit of its collective-bargaining agreement.

(c) Threatening employees with reprisals, including layoff, if they joined or attempted to join the above-named Union.

(d) Telling its employees that they were required to notify the Respondent before they joined the above-named Union.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effecuate the policies of the Act:

(a) Offer Edward M. LaFave immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled, "The Remedy."

(b) Make Edward M. LaFave whole for any loss of wages or benefits he may have suffered since on or about October 11, 1979, as a consequence of the Respondent's refusal to apply the terms of the collective-bargaining agreement with the Union to the said Edward M. LaFave.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to analyze the amount of backpay or other benefits due under the terms of this Order.

(d) Post at its Watertown, New York, facility copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the said Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[14] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."